

Nos. 10956 and 10984

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

KINNER MOTORS, INC.,

Respondent.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

KINNER MOTORS, INC.,

Respondent.

ON PETITIONS FOR ENFORCEMENT OF ORDERS OF THE
NATIONAL LABOR RELATIONS BOARD.

BRIEF OF RESPONDENT.

FILED

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BRIEF OF RESPONDENT.

Although these two cases are combined and involve the same parties they are separate and distinct, and we desire to submit this brief in two parts.

Case No. 10956.

Since the order of the National Labor Relations Board was made in this case the respondent has stipulated to an election for a Bargaining Representative. That said election was held and the International Association of Machinists A. F. of L. won the election and now are the ap-

proved Bargaining Representative of the employees of the respondent. Therefore, most of the order has become moot and therefore the respondent consents that an order be made enforcing the order of the National Labor Relations Board with the exception of those portions of the order which read as follows:

“1. Cease and desist from:

“(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist International Association of Machinists, Lodge No. 311, affiliated with the American Federation of Labor, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purposes of collective bargaining or other mutual aid or protection as guaranteed in Section 7 of the Act.” [Tr. p. 19.]

There is not one word of evidence that the respondent ever did a single act which interfered with the joining of its employees with the International Association of Machinists Local No. 311 or any other union and therefore there is no basis for such a restraining order. By reason of the fact that the Machinists Union is now the Bargaining Representative conclusively shows that no such interference was ever had.

The cases of *N. L. R. B. v. Walt Disney Productions*, 146 Fed. (2d) 44; *N. L. R. B. v. Cowell Portland Cement Co.*, 148 Fed. (2d) 237; *N. L. R. B. v. Newark Morning L. Co.*, 120 Fed. (2d) 263, and *N. L. R. B. v. Lipshutz*, 149 Fed. (2d) 141, are directly in point and prohibit the Board from making such a broad order.

Neither does the case of *N. L. R. B. v. Express Publishing Company*, 312 U. S. 426, authorize such a blanket order.

The above cited cases follow and interpret the *Express Publishing Company* case.

As was stated in the *Express Publishing* case:

“The mere fact that a court has found that a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged.”

Case No. 10984.

In this case the N. L. R. B. order provided for the reinstatement of employees Davis, Gilpin and Swope. We believe there is no substantial evidence that these men were discharged for union activities but on the contrary the evidence is positive they were laid off by reason of the cancellation of contracts and the closing of the night shift in the tool room in which they were employed.

The testimony in that regard is as follows:

“I remember the incident of the layoff of Mr. Swope. When I got to the termination of the work where I wasn't able to supply further work for him I had to make out a release and lay him off. [338] I talked to Mr. Davey about the matter. I simply pointed out to him that the work was getting so slack that I didn't know what to do with the night men and particularly Mr. Swope at that time. The job that he was on should have been finished the night before

and it was only half finished so I had to lay him off that same day. I did not have enough work for him to go through the entire night. If I had kept him on it would have been an economic loss for the balance of the time. [339] I reported this situation in connection with the lack of work on the day I laid Mr. Swope off. I talked to Mr. Swope at the time. [340] I said that the work was getting so slack I would have to lay him off. I never noticed Mr. Swope wearing any A. F. of L. badges or union buttons. In regard to the layoff of Mr. Gilpin and Mr. Davis, I talked to Mr. Davey. I told him the work was so slack I didn't know what to do with the men. He said 'use your own judgment, you will have to do what you consider best'. Since February 23rd there has never been operated any night shift in the tool room at Plant #1. [341] In my opinion it has not been necessary to operate a night shift in the tool room in Plant #1. [342] I have been with Kinner Motors since 1929. I have been in charge of the Tool Room since 1936. In my opinion since February 23rd it has not been necessary to operate the night shift in the tool room in Plant #1. I talked with Gilpin and Davis on the night they were laid off. I told them it was on account of the lack of work. [343] Prior to the time that Swope, Davis and Gilpin were laid off the work in the night shift in Plant #1 was gradually decreasing right along. At one time we had probably thirty-five or forty or fifty men working there. [344] I decided myself to lay off Davis, Gilpin and Swope. I decided the day that I laid them off. It was because I had no work for them to do. I discussed the matter with Mr. Davey. [345] I told Mr. Davey the time was drawing to such a close on work I didn't now what to do with the men in order to keep them in work. I was giving them little insubordinate jobs that didn't amount to

anything. It just simply run out. I didn't know what to do with them. He told me the only thing I could do was to lay them off. I did not mention Gilpin or Davis by name. [346] I made out a slip for Swope when I laid him off. I instructed the stenographer to write on the slip 'lack of work' which was the reason I was laying Swope off. I made out the slips for Gilpin and Davis. [347] I told the stenographer to make out the releases and she wanted to know what foundation and I told her lack of work."

Edward Davey testified in substance as follows:

"I remember a conversation with Mr. Nichols in relation to the tool room at Plant #1. [349] Mr. Nichols stated he was running out of work which had been evident for some time other places. I told Mr. Nichols that that was his job. [350] I had another conversation with Mr. Nichols. He said that he had reached the end of his work; that he couldn't find any more work. He said 'what about it'. I said 'that is up to you. That is your job to keep that tool room in shape and get the necessary tools out and all that.' Prior to February 16th, I never saw Gilpin. Davis or Swope wear any union buttons." [353]

The foregoing testimony is undisputed and clearly shows that all work in the tool room in Plant #1 had ceased and it is further substantiated by the fact as found in the Findings of Fact in the Intermediate Report, page 28 of the transcript, which reads as follows:

"As previously noted, it is respondent's position that Swope, Davis & Gilpin were temporarily laid off because of lack of work. It appears that on December 29, 1943 contracts in an amount of \$1,-500,000.00 involving production at Plant #1 were

cancelled leaving a balance of \$400,000.00 in contracts for that plant. That no new contracts for that plant were obtained until subsequent to February 23rd, 1944. It further appears that no tool makers have been employed in the tool room at Plant #1 on a night shift since the named employees were discharged or laid off."

We therefore have the uncontradicted testimony that the work was practically ceasing in the tool room in Plant #1 caused mainly by the cancellation of \$1,500,000.00 of contracts. We therefore feel that no other conclusion can be drawn but that these men were laid off not for any union activities but because of lack of work on the job in which they were employed.

The only evidence that they were discharged for union activities is by reason of the fact that Davis testified in Case No. 10956 adverse to the respondent and that Swope and Gilpin sat with him during the hearing.

Even if such a strained inference can be drawn from the evidence by the Board which we believe to be inconceivable nevertheless the refusal to reinstate them was proper when the respondent later learned of the very unpatriotic statements made by them in regard to the purchase of war bonds.

The evidence is uncontradicted and overwhelming that these three men made the most unpatriotic, reprehensible, dissention provoking and morale destroying statements among themselves and to other employees of respondent in regard to the purchase of war bonds.

Let us briefly summarize the evidence in this regard.

(All numbers refer to the pages of the transcript of the record in case No. 10984.)

Leslie M. Dayhoff, who incidentally was a witness for the Board, testified in substance as follows:

"I told Mr. Brian Johnson that these three men were trying to discourage the war bond sale. I told him that the three men had stated that people were spending their money foolishly, and the War Bonds would not materialize, nobody would ever get their money back from them. [141-142] I heard Swope say that people were foolish to buy them. I also heard Davis say that you wouldn't get your money back. I also heard Swope say that, and he also said it was foolish for anyone to buy them."

Glenn Henry Gilmore testified in substance as follows:

"I had conversations with Mr. Gilpin and Mr. Davis but not with Mr. Swope in regard to war bonds. This was in the presence of Mr. Malamphey and the rest of the boys in the tool room. I heard Mr. Gilpin say that the war bonds were no God damn good. [Page 355] Jim Davis also told me that as far as he was concerned they are no damn good and how did I know that they are going to cash them in when they mature. The country might not be any good. I told him the country is plenty good and that I liked it here and if he didn't like it why in the hell didn't he get out. Mr. Gilpin offered to sell me a bond for \$10.00. [356] I got accused of being tough with him. He said the bonds were no good. I heard him say several times that he didn't think the bonds were worth a damn." [357]

Vera H. Allen testified in substance as follows:

“I had a conversation with James Davis. He stopped by my machine where I was completing a bond for somebody else and he made the statement that the bonds would not be worth a nickle after the war. I heard him make similar statements to other people.” [358]

Clifton Edmond Malamphey, Jr., testified in substance as follows:

“We get our bonds in envelopes. We all had our bonds and these two fellows, Mr. Davis and Mr. Gilpin had theirs, too. They said they were no good. They would be no good after the war. And they said they were also selling them as soon as possible. Mr. Davis said he was selling them as soon as possible, and Mr. Gilpin said he would sell them to anyone for \$10.00.” [360]

John A. Szabo testified in substance as follows:

“I had a conversation with Mr. Davis, Mr. Gilpin and Johnson and Koler and Les Dayhoff. Gilpin said that the Red Cross was making money on the blood. They were selling it. [361] I had a conversation with Mr. Gilpin and Mr. Davis, and I think Mr. Gerth was up there, and that was up in the Men’s Room. Gilpin said that he saw they were selling the War Bonds again. I said, yes. I said, I got about \$1500.00 worth. He said, ‘well they won’t be worth a nickle after the war. They won’t be no account.’ [362] One night Swope said, ‘I wouldn’t give you a nickle for any War Bond.’ [363] One night I talked to Garrett and I asked what he thought of those fellows making those remarks about War Bonds in the Men’s Room, and I told him that if they said that up at the Victory House that they would probably mob them.” [364]

Frank Peter Holmes testified in substance as follows:

"I had a conversation with Mr. Davis and Mr. Gilpin about War Bonds. I told them I got a \$50.00 bond a month and they said they would not be worth \$5.00 a piece after the war. Both of them said that."

John Hardy Shelley testified in substance as follows:

"I have had several conversations with Mr. Davis, Gilpin and Swope about War Bonds. I told them I had gotten a \$50.00 bond and Gilpin told me that I could paper the house with it."

Not only is all of the foregoing testimony not denied or controverted in any way but the three men, Davis, Gilpin and Swope practically admitted making these statements. Their testimony is as follows:

James Davis testified:

"I heard a conversation between Mr. Gilpin and Mr. Shaw. Mr. Shaw asked Mr. Gilpin if he would sign up to buy more bonds. Mr. Gilpin said no, that he didn't believe in buying bonds for a profit while the boys were shedding blood in Europe. He didn't believe in buying for a profit. He believed in giving them the money. [234] I remember one conversation I had with Mr. Dayhoff when I said I didn't believe in tying up all the money that a man had in War Bonds because they might be frozen at any time and he wouldn't have the opportunity to get necessary money in case of sickness, etc. [292] I told Mr. Dayhoff that it was possible that the Government debt would get so big they couldn't pay it off." [293]

Richard Swope testified as follows:

"I talked to Mr. Dayhoff about bonds. I asked him how long he thought it would take us to make up

the amount of money referred to in the newspaper, about the three and a half million dollars being allowed to the Treasury Department for advertising on war bonds. I asked him how long he thought it would take us at Kinner's to make that amount up, that was spent not in furthering the war effort in the way of buying materials but for advertising. That they should forget about the three and a half million dollars for advertising." [315]

Lewis Gilpin testified as follows:

"I discussed War Bonds with anybody that said anything to me about them. I told them that I thought people ought to give their money when the boys were giving their lives and shouldn't monkey with War Bonds. [220] I told Mr. Dayhoff that I didn't think buying War Bonds for a profit for the lives of the American soldiers over there that were dying, I didn't think that was right. [230] I made these statements to practically everybody I talked to—not only to employees—to anybody, and I am saying it to you."

It is beyond belief that the Board could hold that these very unpatriotic statements of these employees could not affect their right to reinstatement and rehiring by Kinner Motors, Inc. This is a war plant and all of the respondent's employees are doing their utmost to further the war effort and when they are compelled to associate with their fellow employees who make such unpatriotic statements and do everything possible within their power to discourage the sale of War Bonds no other conclusion can be reached but that such statements did create dissention, in-harmony and interruption of and interference with production and discipline in the plant of the respondent. Further, the finding of the Board that this evidence, that their

talk concerning War Bonds did not provide an actual impediment to the sale of War Bonds or create dissention is inconceivable. We therefore respectfully urge that such unpatriotic conduct and statements on the part of these three employees justified the respondent in failing to re-instate them when this action was called to the attention of the respondent.

We further respectfully urge that that portion of the order in paragraph (1), subdivision (a) and paragraph (1) subdivision (c) [pages 16 and 17 of the transcript] which reads as follows:

“1. Cease and desist from:

“(a) Discouraging membership in International Association of Machinists, affiliated with the American Federation of Labor, or in any other labor organization of its employees, by discriminating in regard to the hire or tenure of employment of any of its employees, or any term or condition of employment;
* * *

“(c) In any other manner interfering with, restraining, or coercing its employees in the exercise of the right to self-organization, to form labor organizations, to join or assist International Association of Machinists, affiliated with the American Federation of Labor, or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act,”

be eliminated. This is a blanket order and there is no evidence in this case that the respondent ever did anything to interfere with the American Federation of Labor or

any other labor organization, and for the same reasons set forth in this brief to the similar provisions of the order in Case No. 10956 and the same authorities therein cited to which reference is hereby made.

Conclusion.

Respondent, Kinner Motors Inc., therefore, respectfully urges that in Case No. 10956, that the Order be modified to eliminate therefrom Section One, Subdivision C, as contained on page 19 of the Transcript, and in Case No. 10984 that enforcement be denied and that it be found that the employees Davis, Swope, and Gilpin were not discharged for Union activities, but by reason of lack of work on the jobs in which they were employed, and that it further be determined that the respondent was justified in not rehiring them by reason of their unpatriotic and dissension-provoking statements, concerning war bonds, and without receding in any way from the foregoing propositions, that, in any event, Paragraph One, Subdivision A and Paragraph One, Subdivision C of the Order, as contained on pages 16 and 17 of the Transcript be eliminated.

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